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No. 72

Supreme Court of the United States

October Term, 1955

FRANK COSTELLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

(a) Opinions Below

The opinions of the Court of Appeals are reported in 221 F. 2d 668.

(b) Jurisdiction

Jurisdiction rests on 28 U. S. C. 1254. The judgment of the Court below was entered on April 5, 1955. Timely application for rehearing was made on April 12, 1955 and denied on April 14, 1955. Petition for certiorari was filed on May 12, 1955. This Court granted limited certiorari on October 10, 1955 (Vol. IV pp. 160, 161).

(c) Constitutional Provision Involved

United States Constitution, Amendment V:

> "No person shall be held to answer to a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, * * * "

(d) Question Presented for Review

May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him.

(e) Statement of the Case

Petitioner was indicted for wilful evasion of income taxes for the years 1946 to 1949 (9a-12a). The case was tried on the net worth-expenditures theory (1854a). Petitioner was convicted on the 1947, 1948 and 1949 counts and was acquitted on the 1946 count (1872a). Conviction was affirmed by the Court below on the 1948 and 1949 counts, but was reversed on the 1947 count because the Court below found sufficient evidence to support the inference of adequate reserves for that year (Vol. IV pp. 145, 146).

Before trial petitioner had moved to examine the grand jury minutes and to dismiss the indictment on the ground that there was no lawful evidence to support it (82a-84a). That motion was denied by Judge Weinfeld (85a-86a).

At the trial the government produced many witnesses who testified about financial transactions with petitioner or his wife in order to establish its "net worth-expenditures" theory of proof. Not one of those witnesses had appeared before the grand jury. In addition the government produced four government agents. The only one of these, Romayne,[1] who had had any personal contact with petitioner (see 116a, 117a), did not testify before the grand jury (1783a). The other three agents, Murphy, Leach and Sohn, who did testify before the grand jury (1397a, 1575a,

[1] And this contact was nearly ten years before the first indictment year, in 1937, when he questioned petitioner about finances (117a, Exh. 23, Vol. IV, pp. 1-10).

1597a), as Judge Hand stated (Vol. IV, p. 152), "had had no personal acquaintance with Costello or his affairs; they were accountants or experts and we find it impossible to escape the conclusion that their computations must have been based on hearsay".

At the end of the government's case petitioner moved to dismiss the indictment on the ground that it had been established that there was no competent evidence before the grand jury (1651a). He renewed the motion at the end of the case (1782a). The trial Court denied both motions (1651a, 1782a). This ground was again advanced in support of motions to set aside the verdict and in arrest of judgment (1876a, 1878a).

The Court below upheld these rulings on the specific ground that an indictment should not be quashed even though based only on hearsay evidence (Vol. IV pp. 152-157). Judge Learned Hand was motivated largely by the consideration that the Courts have upheld indictments, though based in part on hearsay evidence, provided this was buttressed by some direct testimony, however slight. Moreover, he expressed some dislike for the hearsay rule where the evidence was "relevant rationally". Judge Frank had "very serious misgivings", but concurred out of deference to Judge Hand's "wisdom" (Vol. IV p. 158).

(f) Summary of Argument

The guaranty of the Fifth Amendment is one of the safeguards of liberty. At the time of its adoption the grand jury had become a body required to render indictments on the basis of evidence. The Courts have universally recognized that a grand jury may indict only if com-

petent evidence is presented to it and that hearsay evidence is not competent evidence. Indictments have been quashed in many Courts, both state and federal, where this rule has been ignored, especially where only incompetent evidence was before the grand jury. Indictments based solely on hearsay evidence have been quashed and convictions obtained on the basis of such indictments reversed. Such must be the rule if the Constitutional guaranty is to be given any effective sanction. None of the objections advanced against such a view have validity.

(g) Argument

The Constitutional requirement that there be an indictment as a prerequisite to prosecution for serious crime derived, as did so many of the provisions of the Bill of Rights, from English history. The history of the provision was traced by this Court in *Hurtado* v. *California*, 110 U. S. 516, 529 ff. As Mr. Justice Matthews there pointed out, originally accusation was practically conviction and the presentment was based not on the testimony of witnesses but on the knowledge of the jurors, or even "common fame and suspicion".[2] But the institution of the grand jury developed until, around the time of the American Revolution, it had taken the form still generally prevalent in this country, of a body that based its indictments on evidence heard by it. Some of this history is traced in Mr. Justice Harlan's dissent in the *Hurtado* case, pp. 543 ff. He stressed (p. 554) the value of the grand jury as protection against tyranny because its members were

[2] See, in this connection, Pollock and Maitland, History of English Law (2d Ed. 1909) Vol. II, 642.

not subject either to the will of the government or the voters. See also Holdsworth's History of English Law (3d Ed. 1922), Vol. I, p. 322; Hawkins' Pleas of the Crown (7th Ed. 1795), Bk. 2, ch. 25, §145.

The Courts have almost universally recognized that (excepting the cases rare in modern times of jurors acting on their own knowledge) a grand jury may indict only on legally competent evidence.

Hearsay evidence (unless within the recognized exceptions) has never been considered competent evidence. The hearsay rule has been deeply rooted in our law of evidence. Its value and necessity have long been recognized. A brief survey will suffice to show that an indictment based exclusively upon it could have "no lawful beginning", to use Judge Hand's language (Vol. IV p. 153).

Chief Justice Marshall, in *Mima Queen* v. *Humphrey*, 7 Cranch 290, at 296, pointed out the "intrinsic weakness" of hearsay testimony and continued by declaring it totally inadmissible because of "its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover."

That view was reaffirmed by this Court in reversing a conviction based in part on hearsay evidence, in *Hopt* v. *Utah*, 110 U. S. 574, where at p. 581 this statement was quoted with approval.

This rule has been rigidly adhered to ever since and many convictions reversed even though there might have been other competent evidence of the crime.

United States v. *Quick*, 128 F. 2d 832 (CA 3d);
Fotie v. *United States*, 137 F. 2d 831 (CA 8th);

Ellis v. United States, 138 F. 2d 612 (CA 8th);
Brown v. United States, 202 F. 2d 474 (CA 5th).

Cf. *United States* v. *Campanaro*, 63 F. Supp. 811, where a new trial was granted despite the government's contention that the objectionable hearsay evidence was cumulative and harmless.

Even in administrative hearings this Court has required that there be sufficient legal evidence to sustain the ultimate finding.

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 230.

As Chief Justice Hughes said at page 230:

> "But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Cf. *NLRB* v. *Bell Oil & Gas Co.*, 98 F. 2d 406 (CA 5th), reh. den. 870;
NLRB v. *Haddock-Engineers*, 215 F. 2d 734 (CA 9th).

Indeed, in the *Bell* case, Judge Holmes said (98 F. 2d at p. 871):

> "* * * The Board is not a court, though it is quasi-judicial in character. It is a fact-finding tribunal with inquisitorial powers in labor controversies, similar to those of a grand jury in criminal cases. In the discretion of the agency conducting the hearing, any person may intervene and present testimony. The fact that incompetent evidence is

> heard does not invalidate an order of the Board, provided the findings upon which the order is based are supported by competent, relevant, and material evidence."

And in the *Haddock* case the Court vacated the Board's order because supported only by hearsay testimony.

Whatever justification there may be for permitting hearsay testimony at a hearing where the credibility and motivation of the witness is subject to examination, and where his story may be tested against other facts, there is none for allowing this to be done at an *ex parte* hearing before a grand jury in the absence of the defendant to protest it and of a judge to proscribe it.

Accordingly it is the general rule in all Anglo-Saxon jurisdictions that hearsay evidence should not be heard by a grand jury, whatever differences of opinion may have arisen as to the consequences which flow from the exclusive use of such hearsay.

Federal Cases

The prevailing view was expressed in 1872 by Mr. Justice Field, sitting in Circuit, in a charge to a grand jury in California:

> "In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence." (30 Fed. Cas. No. 18, 253, p. 992, 2 Sawy. 667).

Another portion of that charge was quoted with approval by this Court in *Hale* v. *Henkel*, 201 U. S. 43, 63: that a grand jury may act "'Not by rumors or reports, but by knowledge acquired from the evidence before you, and

from your own observations.'" And Mr. Justice Brown went on to say (p. 65):

> "While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses given before them."

Charges similar to that of Justice Field continue to be given. In 1938 Judge Ford in Boston charged: "I point out that you are to receive legal evidence, in contra-distinction to reports, rumors and hearsay evidence" [8 Law Soc. J., 205, 210 (1938)]. And in 1951 Judge Yankwitz so charged a grand jury in California (16 F. R. D. 93):

> "Every indictment which you return is *prima facie* evidence of the existence of probable cause. And probable cause exists only when there is competent evidence, direct or circumstantial, before you which leads you, as reasonable persons, to believe that the defendant is guilty of the offense charged.
>
> "Hearsay testimony, i.e., testimony as to facts not known by a witness of his own personal knowledge, but told him by others than the defendant, is not enough. If there is competent testimony showing probable cause the fact that there may also be hearsay testimony becomes unimportant. But there must be some competent testimony before you, otherwise there is no probable cause. * * *
>
> "On the whole, however, before returning an indictment you should be satisfied from the evidence submitted that a conviction by a trial jury would be warranted if the evidence presented to you were to be the only one before the trial jury. * * *"

In *United States* v. *Farrington*, 5 Fed. 343 (1881) Judge Wallace quashed an indictment because based on hearsay and other incompetent evidence.

In *United States* v. *Kilpatrick*, 16 Fed. 765 (W. D. N. C. 1883) Judge Dick granted a motion to quash an indictment because based on incompetent evidence and said (p. 771):

> "Investigations before grand juries must be made in accordance with the well-established rules of evidence * * *."

In *United States* v. *Bolles*, 209 Fed. 682 (W. D. Mo. 1913), Judge Youmans in the course of an opinion denying a petition to allow certain persons to appear before a grand jury said (p. 684):

> "To warrant the return of an indictment it should be based on competent legal evidence, such as is legitimate and proper before a petit jury."

In *United States* v. *Rubin*, 218 Fed. 245 (D. Conn. 1914), Judge Thomas quashed an indictment based on hearsay evidence. After quoting from Justice Field's charge already referred to, he went on to say (p. 248):

> "This general proposition of law relating to the kind and character of evidence proper for consideration by the grand jury has been generally followed in the better-considered cases in the federal courts. Under this rule hearsay evidence is improper and an indictment founded upon it is invalid."

The right to challenge an indictment for lack of competent evidence has been more recently recognized in the Third, Fifth, Eighth, Ninth and Tenth Circuits:

United States ex rel. Potts v. *Rabb*, 141 F. 2d 45 (CA 3d, 1944);

Duarte v. *United States*, 171 F. 2d 971 (CA 5th, 1949);

Brady v. *United States*, 24 F. 2d 405 (CA 8th, 1928);

Nanfito v. *United States*, 20 F. 2d 376 (CA 8th, 1927);

Olmstead v. *United States*, 19 F. 2d 842 (CA 9th, 1927), affd. (without discussion of this point) 277 U. S. 438, Cf. *Phelps* v. *United States*, 160 F. 2d 626 (CA 9th, 1947);

Cox v. *Vaught*, 52 F. 2d 562 (CA 10th, 1931);

Gates v. *United States*, 122 F. 2d 571 (CA 10th, 1941).

In the *Potts* case Judge Biggs stated (141 F. 2d at p. 47):

> "If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion [to quash]."[3]

In the two cases from the Eighth Circuit convictions were reversed because all the evidence before the grand jury was incompetent. In the *Brady* case Judge Phillips said (24 F. 2d at p. 407):

> "It is the settled law of this circuit, we think, that an indictment will be quashed, where there was either no evidence whatever, or no competent evidence of the offense charged, presented to the grand jury."

[3] At the subsequent hearing an attempt to prove the absence of evidence by calling the prosecutor was blocked and the motion denied for lack of proof: *United States* v. *Potts*, 57 F. Supp. 206 (N. D. Pa. 1944).

In the *Olmstead* case Judge Gilbert said (19 F. 2d at p. 845):

> "* * * While it is the rule in many jurisdictions that the court will not inquire into the sufficiency of the evidence before the grand jury, the decisions of the Supreme Court and those of most of the inferior federal courts have been to the effect that an indictment cannot be abated, on account of the admission of incompetent or hearsay testimony, unless it affirmatively appear in the plea that no competent evidence of the commission of the offense charged therein was presented to the grand jury, or unless all of the evidence was unlawfully procured in violation of substantial rights of the accused, so as to subject it to exclusion if offered against him. Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; Chadwick v. United States (C. C. A.) 141 F. 225; United States v. Standard Oil Co. (D. C.) 154 F. 728; Hillman v. United States (C. C. A.) 192 F. 264; McKinney v. United States (C. C. A.) 199 F. 25; Anderson v. United States (C. C. A.) 273 F. 20; United States v. Morse (D. C.) 292 F. 273; United States v. Silverthorne (D. C.) 265 F. 859. * * *"

In the *Cox* case Judge McDermott said (52 F. 2d at p. 563):

> "The grand jury is charged to investigate the facts presented to it, and to return indictments only if there is legal and competent evidence that an offense has been committed and reasonable ground to believe that those charged are guilty. There is a strong presumption that the grand jury has faithfully discharged its duty. While the presumption is

strong, it is not irrebuttable, and if it is clearly proven that an indictment was returned without evidence, the indictment must be quashed."

No case has been found, other than the case at bar, contrary to these.[4]

The state of the law in the federal Courts was reviewed in 1948 in a Note in 62 Harvard Law Review 111. The author found (p. 113) that the general rule permitted quashing of the indictment on "a showing that the grand jury heard no competent evidence whatsoever tending to establish the probable guilt of the accused". He suggested (p. 115) that the Court should quash the indictment whenever it found that either hearsay evidence ["The vice of this evidence is that there is no sufficient guide to its credibility."] or unauthenticated documents "played a significant part in the return of the indictment".

State Cases

There is a considerable body of authority to the effect that if a grand jury has not heard any competent evidence, the indictment is invalid. In eight states there are direct holdings to that effect: Alabama, California, Missouri, Nevada, New York, North Carolina, Oklahoma and Penn-

[4] In *Banks v. United States*, 204 F. 2d 666 (CA 8th 1953), 223 F. 2d 884 (CA 8th 1955), now on application for certiorari (No. 337), and *Zacher v. United States*, decided by the same court on November 4, 1955 (CCH 55-2 USTC, Para. 9745), agents who had interviewed the defendant testified to admissions made [see e.g. brief in opposition to petition for certiorari in the *Banks* case (Oct. Term 1953, No. 259), p. 12, footnote 4]. The Court of Appeals in the *Zacher* case expressly refrained from passing on the question here involved.

sylvania. Those in Alabama, New York and Oklahoma deal precisely with the question of hearsay testimony:

Walker v. *State*, 17 Ala. App. 555, 86 So. 257 (1920)—conviction reversed;

Dong Haw v. *Superior Court*, 81 Cal. App. 2d 153, 183 P. 2d 724 (1947)—prohibition granted;

State v. *Grady*, 84 Mo. 220 (1884)—conviction reversed and hearing directed to determine issue;

Ex Parte Stearns, 68 Nev. 135, 227 P. 2d 971 (1951)—hearing directed to determine issue;

People v. *Levine*, 188 Misc. (N. Y.) 127,[5] 67 N. Y. S. 2d 270 (1947)—indictment quashed.

State v. *Ivey*, 100 N. C. 539 (1888)—indictment quashed;

Estill, Jr. v. *State*, 43 Okla. Cr. 99, 277 P. 256 (1929)—conviction reversed and hearing directed to determine issue on the basis of constitutional right;

Com. v. *Padden*, 160 Pa. Sup. 269, 50 A. 2d 722 (1947)—indictment quashed.

While in several of these states there are statutory provisions prohibiting hearsay before grand juries,[6] it has

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[5] Conviction will be reversed if the motion is not granted: *People* v. *Nitzberg*, 289 N. Y. 523, 47 N. E. 2d 37 (1943); that case did not involve hearsay. In *People* v. *Kiefer*, 173 Misc. (N. Y.) 300, 16 N. Y. S. 2d 858 (1940) an indictment was quashed as to two of the defendants because "There is no direct proof in the minutes that either of these two was present that night. The only proof is hearsay of this fact from an alleged accomplice * * *."

[6] Specimens are set forth in Appendix A, p. 25, *infra*.

been held that the power to quash an indictment based on incompetent evidence stems from the common law or arises because of the constitutional guaranty. Thus, in *People* v. *Glen*, 173 N. Y. 395 (1903) the Court held that the power to quash an indictment based on incompetent evidence rested on the Constitution and could not be restricted by the legislature.[7] Judge Werner said at page 400:

> "But our courts have also always asserted and exercised the power to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal and incompetent testimony. (*U. S.* v. *Coolidge*, 2 Gall. 364; *People* v. *Restenblatt*, 1 Abb. Pr. 268; *People* v. *Briggs*, 60 How. Pr. 17.) This power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional."

In *Royce* v. *Territory*, 5 Okla. 61, 47 P. 1083 (1897), the Court said with respect to the applicable statute:

> "These provisions simply declare and codify the rules of the common law, under which no indictment was valid, unless found and based upon legal and competent evidence; * * * " (5 Okla. at 67).

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[7] This principle has been continuously recognized in New York: *People* v. *Seaton*, 187 N. Y. 495, 511 (1907); *People* v. *Nitzberg*, 289 N. Y., at 526; *People* v. *Frost*, 204 Misc. 44 (1953).

The general rule is exemplified also by statements in the following cases:

Pfeiffer v. *State*, 35 Ariz. 321, 323, 278 P. 63 (1929): The Court recognized that inquiry was proper when it is charged "that the grand jury had no evidence before it, or that *all the evidence was hearsay*". (Emphasis ours.)

Summers v. *State*, 63 Ga. App. 445, 11 S. E. 2d 409 (1940): the Court said at page 447:

> "We think it is unnecessary to point out that hearsay evidence has no probative value; in other words hearsay evidence amounts to no evidence."

See also:

People v. *Bladek*, 259 Ill. 69, 102 N. E. 243 (1913);

State v. *DeGroate*, 122 Iowa 661 (1904);

People v. *Lauder*, 82 Mich. 109, 46 N. W. 956 (1890);

State v. *Kasherman*, 177 Minn. 200, 224 N. W. 838 (1929);

State v. *Lawler*, 221 Wisc. 423, 267 N. W. 65 (1936).

In Maryland and perhaps New Jersey the question appears to be open. See *Bernard* v. *Warden of Maryland House of Correction*, 187 Md. 273, 49 A. 2d 737 (1947); Cf. *Lenoir* v. *State*, 197 Md. 495, 80 A. 2d 3 (1951). See *State* v. *Donovan*, 129 N. J. L. 478, 30 A. 421 (1943).

Some other states appear to have ruled that the Court may never inquire into the character of evidence received,[8] but often such holding appears to rest on the Court's con-

[8] See e.g. *State* v. *Chance*, 29 N. M. 34, 221 P. 183 (1923).

struction of the state statute specifying the grounds on which an indictment might be quashed.[9]

Cases from the British Empire

The general rule that a grand jury should not receive hearsay evidence is well established. Thus, in *Denby's Case*, 1 Leach 514, 168 Engl. Rep. 359 (1789), the Court ruled that a grand jury might not consider hearsay. To like effect are *R.* v. *Willett*, 6 T. R. 294 (1795), *R.* v. *Carbray*, 13 Quebec L. R. 100 (1887), and *Keenan* v. *Boylan*, 1 Sch & Lef. 232 (Ireland, 1803). And in *R.* v. *Thurstan*, 16 Br. Col. R. 326 (1911) the Court treated as a nullity an indictment based only on depositions.

In *Bélanger* v. *R.*, Quebec Rep. 12 K. B. 69 (1902) the Court rejected the contention that the indictment should be quashed only because it found that the grand jury had not, in fact, read the objectionable depositions. Judge Hall thus commented on the importance of the grand jury as a safeguard against tyranny (p. 95):

> "One of the safeguards, secured by a specific clause in Magna Charta, is the grand jury, whose duty is to investigate each charge of alleged violation of the criminal law and to determine whether or not there is sufficient *prima facie* evidence of guilt to subject an accused person to the odium and expense and risk of a criminal process. * * * such an institution is a bulwark against oppression. * * *"

and at page 98:

> "A good deal of latitude is allowed to a grand jury as to the kind of evidence upon which its con-

[9] See e.g. *State* v. *Kelliher*, 49 Or. 77, 88 P. 867 (1907).

clusions may be based. Of course *illegal* proof should not be admitted, * * *."

And Judge Wurtele said (p. 102):

"* * * it is clear that the evidence submitted to a grand jury must be legal evidence. Depositions taken at the preliminary inquiry can only be read to a grand jury in cases where such depositions can be used as evidence before a petit jury and read to it."

In *Rex* v. *Dickerson*, Russ & Ry 401, 168 Engl. Rep. 866 (1819) the grand jury acted on the basis of unsworn testimony. This was not discovered until after conviction. The trial judge was concerned whether it was too late to urge the point and reserved the question. The twelve judges avoided decision by suggesting that the defendant be pardoned.

The Views of the Court Below

Judge Hand's opinion starts out with dislike of what he called the "amorphous compromise" resulting from the rule that an indictment will be sustained if hearsay or other incompetent evidence is supplemented by a "modicum" of direct proof (Vol. IV pp. 154, 155).[10] Presumably that dislike rested on the possibility that it affords

[10] Citing *Holt* v. *United States*, 218 U. S. 245, 248 (1910), and various Court of Appeals decisions. It is, of course, not necessary for the Court to pass on the soundness of this rule in the case at bar. It may be noted, however, that it has been rejected in New York where the courts determine whether there was sufficient legal evidence before the grand jury to make out a *prima facie* case. See *People* v. *Nitzberg*, 290 N. Y. 523; *People* v. *Porter*, 54 N. Y. S. 2d 3 (1945); *People* v. *Wasserbach*, 185 Misc. 67 (1945). Cf. *People* v. *Leary*, 305 N. Y. 793 (1953).

no satisfactory criterion for determining on just what evidence the grand jury really relied. And, since Courts have often held a "modicum" of evidence to be enough, of what value is the basic rule against allowing hearsay, suggests Judge Hand. He might as well reject the rule against allowing convictions on uncorroborated confessions because often Courts have required little corroboration. (See *e.g. Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.)

Judge Hand notes that hearsay evidence might be as dependable as any other at a trial—that is, if the parties didn't object to it (Vol. IV pp. 154, 155). But, as Judge Frank points out (Vol. IV. p. 158), they at least have the opportunity to object at a trial, which a defendant does not have before a grand jury. Judge Hand then continues with a discussion of the objections to hearsay because of lack of opportunity for cross examination and points out that this is absent, in the case of a grand jury, even as to direct testimony. He notes that there is "some warrant of reliability in an oath, and more in the opportunity to observe the witness" (Vol. IV p. 156), but he minimizes these elements because if they were to control they should exclude hearsay altogether.

Actually that is the recognized rule—hearsay should not be presented to a grand jury. But since it often is and there is no judge on hand to make rulings, many Courts have held that it would be improper to conduct an inquiry to determine to what extent the improper evidence had influenced the jury. But these considerations are entirely absent where, as here, there was no competent evidence at all.

Finally, there is implicit in Judge Hand's opinion the view that hearsay testimony isn't so bad after all. We have already quoted statements by this Court to the contrary. No useful purpose would be served by attempting to reconcile the views of the text writers or the logic of the numerous exceptions to the hearsay rule. The rule is firmly embedded in our jurisprudence. It should not be abrogated completely, especially in determining the basis for indictment guaranteed by the Constitution.

Some General Observations

An examination of the numerous cases on the subject discloses an almost unanimous acceptance of the principle that it is improper for a grand jury to base an indictment on any but legal evidence. While that principle has received recognition in many states in legislative enactments such as those of New York and California, for instance, it is clear that these embody the common law as developed over a long period of time.

The conflict among the authorities relates to the remedy. It resembles, to a considerable degree, the conflict over the remedy to be applied in cases of illegal searches and seizures [see *Wolf* v. *Colorado*, 338 U. S. 25, 33-38]—though the line-up of states is quite different. In that situation this Court, many years ago, supported the view that the only effective way to enforce the guaranty of the Fourth Amendment was to bar the use of evidence illegally seized, and reverse convictions obtained on the basis of such violation—regardless of other evidence of guilt (*Weeks* v. *United States*, 232 U. S. 383). The practice then developed of a holding pre-trial hearings to develop

the facts (Fed. Rules Cr. Proc. 41(e)).[11] So in connection with violations of the indictment guarantee of the Fifth Amendment the only effective way to prevent abuses is to ban a trial resulting from an illegal indictment and reverse a conviction so obtained.[12] To what extent similar pre-trial hearings should be permitted need not be decided in the case at bar, but such procedures have been in existence for many years in states such as New York. For the objective of the constitutional guaranty is to protect against the disgrace of indictment and the expense and strain of trial.[13] That can only be effectively accomplished if a defendant be permitted to show that the indictment was obtained without proper evidence to support it (See Joyce, Indictments (1924), §142, p. 173).

In opposition to the views here expressed various considerations have been advanced in the authorities. The oldest objection was a practical one: grand jury proceedings were not recorded; to permit inquiry might result in conflicting versions of what occurred. That argument no longer has any validity.

Some judges have expressed concern lest the traditional secrecy of the grand jury be violated by disclosure of its proceedings.[14] We submit that this arises from a misconception of the purpose of that secrecy. Its main pur-

[11] And analogous procedures have been developed to deal with illegal wiretapping (*Nardone* v. *United States*, 308 U. S. 338).

[12] Indeed this is even more necessary here, since there is not here available any other remedy, such as, in the case of illegal searches, the classic action for trespass.

[13] See Chief Justice Shaw in *Jones* v. *Robbins*, 8 Gray (Mass. 1857) 329, at 344; Cf. Weinfeld, *J.* in *United States* v. *Lamont*, 18 F. R. D. 27, 35 (1955).

[14] See e.g., *State* v. *Fasset*, 16 Conn. 457 (1844).

pose was protection of the innocent so that until an indictment was rendered there should be no publicity which might harm persons under investigation. Once an indictment has issued, however, that reason no longer prevails.

As this Court said in *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, at p. 234:

> "But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."[15]

The objection based on secrecy has, we submit, no application here. For Federal Rule of Criminal Procedure 6(e) expressly imposes the obligation of secrecy only on jurors, attorneys, interpreters or stenographers and, therefore, not on witnesses. Even as to those included the rule recognizes that they may be required to disclose what occurred "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury" (the full text is set forth in Appendix B, p. 26, *infra*). The Courts have accordingly ruled that the veil of secrecy may be lifted after an indictment has been found when justice requires.

United States v. *Alper*, 156 F. 2d 222 (CA 2d 1946);

United States v. *Byoir*, 58 F. Supp. 273 (D. C. Tex. 1945);

In re Bullock, 103 F. Supp. 639 (D. C. D. C. 1952);

United States v. *Reese*, 11 FRD 424 (D. C. Pa. 1951).

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[15] See also *Cox* v. *Vaught*, 52 F. 2d 562.

True, it has been suggested that some witnesses might be reluctant to appear unless assured that their identity would not be disclosed. But surely that is no valid reason for disregarding the rights of a defendant. In the first place, if the witness' testimony is material to the prosecution he will have to appear at the trial (indeed, in many jurisdictions, his name will have to be endorsed on the indictment). In the second place, however far we have gone in protecting the "faceless informer", such considerations have no place in the enforcement of the criminal law. Moreover, there is no compelling necessity for disclosing the testimony of the witnesses. In New York, for instance, the judge often examines the minutes without disclosing them to the defense. See *People* v. *Porter*, 54 N. Y. S. 2d 3; *People* v. *Wasserbach*, 185 Misc. 67.

Perhaps the most generally adopted position of those who hold the Courts impotent in this field is that while indictments should be based only on legal evidence, it would be too difficult to find out the facts since by doing so there might be a disclosure of the prosecution's case to the defendant. That, we submit, is an outmoded point of view. While the machinery of mutual discovery now applicable to civil litigation in the federal Courts cannot be adopted in criminal cases because of a defendant's right to remain silent, there is no reason to fear any prejudice to effective prosecution from the limited disclosure involved in determining whether an indictment should be quashed.

To begin with, of course, a defendant cannot obtain any relief unless he is armed with some facts. That is well recognized even in jurisdictions such as California and

New York. Thus there must be a *prima facie* showing of abuse. In the next place, it is not necessary that there be any pretrial disclosure whatever. For the facts can be developed, as they were in the case at bar, from questioning the witnesses at the trial. If it should be considered more economical to have the matters looked into before trial (as is the view in California, for instance) the prosecution can limit the inquiry very easily. Under the rule generally recognized in federal Courts that an indictment will be quashed only if there is *no* legal evidence, the prosecutor need establish only that at least some competent witnesses testified from their own knowledge. It would be a strange case, indeed, where this could not be done without any prejudicial disclosure of the prosecution's case. But perhaps the most conclusive answer to this objection to an enforcement of the constitutional guaranty is that there has been no lack of effective enforcement of the criminal law in states such as New York and California, which permit challenges to indictments based on incompetent evidence.

Regardless of all these considerations, the truth of the matter is that a prosecutor who is concerned with the responsibilities of his office will not get into any situation calling for judicial scrutiny. He will avoid calling witnesses who are incompetent or have no knowledge of the facts. Particularly should this be possible in income tax cases, which are usually thoroughly investigated before prosecution is contemplated. And, to take care of unusual situations, Congress has extended the six year period of limitation[18] in tax cases (26 USC 6531). So if not enough

[18] This period is longer than that for any offenses except capital ones (See 18 U. S. C. 3282, 3283).

evidence has been developed to warrant submission to a grand jury, the revenue agent may file a complaint (18 USC 3045) and the United States Attorney then has an additional period of nine months to obtain an indictment. (The text of both these provisions is set forth in Appendix *infra*, pp. 27-29, *infra*.)

Accordingly there is no reason why prosecutors should not be required to comply with the universally recognized rule that the evidence to be presented before a grand jury should be competent. Where, as here, that rule has been completely disregarded the resulting indictment is invalid and violates petitioner's constitutional rights.

CONCLUSION

It is respectfully submitted that the conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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APPENDIX A

New York

Code of Criminal Procedure.

§256. The grand jury can receive none but legal evidence.

§258. The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

California

Deering's Penal Code 1949

§919. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

§921. Substantially identical with New York §258.

Nevada

Hillyer's Comp. L. 1929 §10822 (the same as California §919)

Hillyer's Comp. L. 1929 §10824 (the same as New York §258)

New Mexico

Stat. 1953 ch. 41, Article 5 §22 (the same as California §919)

Stat. 1953 ch. 41, Article 5 §25 (the same as New York §258)

Oklahoma

Stat. 1951 Title 22 §334

The grand jury may not receive hearsay or secondary evidence.

Stat. 1951 Title 22 §336 (the same as New York §258)

APPENDIX B

Federal Rules of Criminal Procedure
Rule 6. The Grand Jury

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

APPENDIX C

Title 26 U. S. C.

§6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counselling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof."

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748 (a) of the Internal Revenue Code of 1939 and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the

date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation of criminal prosecutions, the rules of section 6513 shall be applicable.

Title 18, U. S. C.

§3045. Internal revenue violations

Warrants of arrest for violations of internal revenue laws may be issued by United States commissioners upon the complaint by a United States attorney, assistant United States attorney, collector, or deputy collector of internal revenue or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the complaint of a private citizen unless first approved in writing by a United States attorney.